

STATE OF MICHIGAN
COURT OF APPEALS

JADE PIG VENTURES, L.L.C.,

Plaintiff-Counterdefendant-
Appellant,

v

DAVID ROBERTS,

Defendant-Counterplaintiff-
Appellee.

UNPUBLISHED

January 17, 2003

No. 234844

Kent Circuit Court

LC No. 00-008696-CK

Before: Meter, P.J., and Neff and Donofrio, JJ.

PER CURIAM.

Plaintiff Jade Pig Ventures appeals by right from an order granting summary disposition to defendant David Roberts in this case involving a contract to purchase land. We reverse and remand for entry of judgment in favor of plaintiff.

Plaintiff filed its complaint on August 31, 2000, stating that it had agreed to purchase certain real property in Wyoming, Michigan, from defendant for \$600,000. Under the terms of the purchase agreement, plaintiff deposited \$25,000 into an escrow account as earnest money. The purchase agreement specified that the earnest money deposit must be refunded “if the purchase is contingent upon conditions specified which cannot be met.”

Plaintiff alleged in the complaint that it planned to develop the property “for use as a housing goods retail establishment” and that

[b]ecause [at the time of the purchase agreement] Jade Pig did not yet have a tenant secured to operate a housing goods retail establishment, the Buy-Sell Agreement included a provision that Jade Pig’s obligation to purchase the Property pursuant to the Buy-Sell Agreement was expressly contingent on “Buyer[’]s approval of a develo[p]ment . . . site plan with the City of Wyoming.”

Plaintiff alleged that it “was unable to secure a tenant for the Property despite its diligent efforts” and that it was thus “unable to obtain a site development plan that was acceptable to it.” Accordingly, plaintiff notified defendant of the problem before the date set for closing and requested that defendant refund the earnest money deposit, but defendant refused to do so. Plaintiff therefore sued for breach of contract, seeking specific performance and declaratory

relief. As an affirmative defense, defendant claimed that plaintiff's suit was untenable because plaintiff "did not submit a site development plan to the City of Wyoming for approval" and thus did not even attempt to fulfill the relevant condition of the purchase agreement.

On September 21, 2000, defendant filed a counter-complaint against plaintiff and a third-party complaint against the title company in possession of the \$25,000 deposit. Defendant alleged that plaintiff breached its duty to satisfy the relevant condition of the purchase agreement and that defendant thus was entitled to the \$25,000 as liquidated damages, as provided by the terms of the agreement.

In plaintiff's answers to defendant's requests for admissions, filed on February 27, 2001, plaintiff admitted that it did not create or submit a site development plan for submission to the City of Wyoming but claimed that "it did not submit a site development plain to the City of Wyoming for the reason that it did not have a suitable tenant."

On March 5, 2001, defendant moved for summary disposition under MCR 2.116(C)(10), arguing that

. . . the [purchase agreement] was not conditioned on Jade Pig's ability to lease the property; it was conditioned on approval of a site plan. Since only Jade Pig could submit such a plan, and since it did not, it cannot now assert non-satisfaction of the condition as a basis to legally terminate the [purchase agreement]. [Emphasis in original.]

On April 27, 2001, plaintiff filed a brief in opposition to defendant's summary disposition motion,¹ arguing that it acted in good faith to secure a tenant and an accompanying site development plan for the property. Plaintiff attached to its brief an affidavit of Scott Wierda, a member of plaintiff who was primarily responsible for the transaction at issue in the instant case. Wierda alleged the following in his affidavit: Plaintiff had not secured a tenant at the time it offered to purchase the property in question. Therefore, for plaintiff's protection, Wierda "insisted that the offer include a contingency that our obligation to purchase the property was contingent on Jade Pig's approval of a site development plan with the city of Wyoming." Plaintiff commonly used the contingency "so that it will not have to purchase commercial properties for which it has no tenant or approved site plan." The contingency "is designed to protect Jade Pig in the event it cannot secure a tenant."

Wierda further alleged that "[t]he creation of a site development plan has many steps" and that "[t]he first step is obtaining a tenant." Wierda alleged that plaintiff actively marketed the property and "conducted surveys, drafted preliminary sketch plans, prepared draft leases and purchase agreements and expended significant money and effort to try to secure Home Depot as a tenant." Wierda stated that after failing to secure Home Depot as a tenant, plaintiff attempted to secure Loews Home Improvement as a tenant but was unsuccessful. Wierda stated that

¹ Plaintiff argued in this brief that the court should grant summary disposition to it instead of to defendant under MCR 2.116(I)(2), which states, "If it appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment in favor of the opposing party."

plaintiff did not submit a site development plan to the City of Wyoming because “[o]nly after a tenant is secured do you proceed to the second step, which is working in a collaborative manner with the tenant and other professionals to develop a site plan that meets the tenant’s particular needs.”

Defendant filed a response to plaintiff’s brief,² stating that “[t]he plain matter is that ‘approval of a site development plan’ clearly does not mean ‘ability to obtain a tenant.’” Defendant argued that the court should construe the contract according to its plain meaning and rule that plaintiff could not rely on the contingency clause because it did not submit a site development plan to the city. Defendant further argued that even if the contract were ambiguous, the court should rule for defendant because plaintiff drafted the agreement, and ambiguous contract terms should be construed against the drafter.

In the responsive brief, defendant called “ridiculous” plaintiff’s representation that a tenant must be obtained before one can apply for a site development plan. However, defendant provided no evidence in support of this assertion, merely stating that “a[n] owner-occupied building has no tenant” and that “tenants are often acquired after approval of a site development plan, and after actual development has begun.”

The motion hearing occurred on May 18, 2001. The court stated:

It is uncontested that Jade Pig did not prepare a development site plan with the City of Wyoming. The reason is, according to the buyer, Jade Pig, that they did not have a prospective tenant.

My attention is drawn in this debate to a sentiment expressed by Jade Pig in argument and in brief concerning practices which are commonplace in the commercial real estate market. I use that phrase because it’s contained in footnote one at page two [of plaintiff’s brief in opposition to defendant’s motion for summary disposition].

Such a claimed commonplace practice in the commercial real estate market might be more fully described by Jade Pig at pages nine and ten [of plaintiff’s brief in opposition to defendant’s motion for summary disposition], a footnote which has meaning to my decision, and I quote:

“Jade Pig frequently includes development site plan contingencies in the offers it makes on properties. It does so for its own protection. As Scott Wierda explains, such provisions prevent Jade Pig from [having to] purchas[e] a specific-use commercial property [when] it does not have,” emphasis by this court, “a secured tenant,” end emphasis, “or an approved development site plan. Indeed, Jade Pig included the contingency to address the very situation that arose here.”

² The court indicated that it did not read or consider this responsive brief because it believed that its filing was not permitted by the court rules. We nonetheless summarize defendant’s arguments here for the sake of clarity with respect to defendant’s position on the relevant issues.

* * *

I don't pretend to have any expertise in the area for which both counsel appear. I do have the mandate to examine language to determine what it means and whether it is sufficient or [sic] for its stated purpose.

* * *

For the reason that that which is ambiguous is construed against the drafter, and in this case it is my opinion that the language is deficient; specifically, the contingency that was that upon which Jade Pig seeks recovery is an approval of a development site plan with the City of Wyoming, and no one was ever contemplated.

To be sure, that maybe no one could be contemplated or no one could be applied for because there was no secured tenant, but these are really two separate contingencies or two separate factors, and I'm of the opinion as in the footnote at pages nine and ten, a clear statement of what was intended, could easily be drafted with the inclusion of subject to buyer having, quote, a secured tenant, end quote, or an approved development site plan.

The fact that this contingency is silent as to not having a secured tenant leads me to conclude that this contingency upon which Jade Pig seeks recovery of its earnest money is unavailable.

The court thus granted defendant's motion for summary disposition, ordering that the \$25,000 be awarded to defendant. The order was stayed pending this appeal.

On appeal, plaintiff first contends that the court erred in granting defendant's motion for summary disposition. We review a trial court's grant of summary disposition de novo. *Wilcoxon v Minnesota Mining & Mfg Co*, 235 Mich App 347, 357; 597 NW2d 250 (1999). In reviewing a motion granted under MCR 2.116(C)(10), we consider the pleadings, affidavits, depositions, admissions, and other documentary evidence available to determine if any genuine issue of material fact exists. *Wilcoxon, supra* at 357-358. We resolve all legitimate inferences in favor of the nonmoving party. *Id.* at 358. A party opposing a motion for summary disposition under MCR 2.116(C)(10) may not merely rely on the pleadings but must establish a factual dispute through "affidavits or other evidentiary materials. . . ." *McCart v J Walter Thompson USA, Inc*, 437 Mich 109, 115; 469 NW2d 284 (1991); see also MCR 2.116(G)(4). If the opposing party fails to produce such evidence, the motion is properly granted. *McCormic v Auto Club Ins Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1993).

The purchase agreement at issue in this case stated that the \$25,000 earnest money deposit must be refunded "if the purchase is contingent upon conditions specified which cannot be met" The agreement further stated, "Subject to Buyer's approval of a development site plan with the City of Wyoming." As noted in *Mehling v Evening News Ass'n*, 374 Mich 349, 352; 132 NW2d 25 (1965), when the fulfillment of a condition precedent depends on a contracting party's own actions and that party refuses to facilitate the fulfillment of the condition, the condition is waived. Accordingly, if plaintiff itself prevented the fulfillment of the

“development site plan” condition, then it cannot legitimately claim a refund of the \$25,000 deposit.

Defendant contended below³ that plaintiff did indeed prevent the fulfillment of the condition at issue because it did not create a site development plan or submit one to the City of Wyoming. However, plaintiff set forth documentary evidence – Wierda’s affidavit – that a site development plan is not sought until after a tenant is secured and that plaintiff could not secure a tenant despite good faith and diligent efforts to do so. Accordingly, plaintiff established, at the least, a genuine issue of material fact regarding whether the “development site plan” condition remained unfulfilled because of its own improper or dilatory behavior or because of factors beyond its control.

The trial court, while admitting that it lacked expertise in the area in question, ruled that the contingency clause was ambiguous and that it should therefore be construed against the drafter, plaintiff. However, we discern no ambiguity with regard to the contingency clause. It clearly states that the purchase was “Subject to Buyer[’]s approval of a development site plan with the City of Wyoming.” The relevant question is whether plaintiff made a good-faith effort to fulfill the condition precedent, and plaintiff submitted evidence that it did indeed do so. We thus conclude that the trial court erred in granting summary disposition to defendant.

Plaintiff additionally contends that the court should have granted summary disposition in its favor. We agree. While plaintiff did not file a separate motion for summary disposition under MCR 2.116(C)(10), it specifically argued in its brief in opposition to defendant’s motion that summary disposition for plaintiff should be granted under MCR 2.116(I)(2). Accordingly, defendant had notice that plaintiff sought summary disposition for the reasons stated in its opposing brief. Nonetheless, defendant failed to produce or to attempt to produce⁴ any documentary evidence to counter plaintiff’s assertions with regard to the site development plan and the requirement of a tenant. Therefore, we conclude that summary disposition for plaintiff was indeed appropriate. See *McCormic*, *supra* at 237.

Reversed and remanded for entry of judgment in favor of plaintiff. We do not retain jurisdiction.

/s/ Patrick M. Meter

/s/ Janet T. Neff

/s/ Pat M. Donofrio

³ Defendant has not filed an appellate brief with this Court.

⁴ We acknowledge the trial court’s statement at the motion hearing that it would entertain no further briefs from defendant. However, defendant did not even *attempt* to introduce any evidence to rebut plaintiff’s assertions concerning the site development plan.